**IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA:**

*CWP.No.552/2002*

Judgment Reserved on 6.8.2007.

**Date of Decision :22nd August, 2007.**

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Ashok Kumar. …Petitioner.

Versus:

N.J.P.C. and others. …Respondents.

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Coram:

**The Hon'ble Mr.Justice Sanjay Karol, Judge.**

Whether approved for reporting?[1]

For the petitioner: Mr.Ajay Mohan Goel, Advocate
Mr.Sunil Mohan Goel,Advocate.

For Respondent No.1. Mr.R.Maniktala, Advocate vice.
Mr.K.D.Shreedhar, Advocate.

For Respondents 2&3: Mr.Ramakant Sharma, Advocate.

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**Sanjay Karol,J**

The subject matter of challenge in the present proceedings is the decision of the Departmental Promotion Committee taken in its meeting held on 26.11.2001 and consequently the respondents' action of not promoting the petitioner from level E-2 to E-3 Grade in its organization.

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[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

Petitioner joined the services of respondent No.1-Nathpa Jhakri Power Corporation (hereinafter referred to as NJPC) on 16.1.1995 as Assistant Engineer (EC) at level E-1. In terms of NJPC's Policy Regarding Promotion of Executives (hereinafter referred to as `the Policy'), petitioner was promoted from level E-1 to level E-2 vide order dated 22nd July, 1998 (w.e.f.1.7.1998). He was posted in the Vigilance Department of NJPC and worked there till 12th June, 2001 when he was transferred to E & C Department Jhakri.

As per policy, subject to fulfillment of the eligibility criteria, a person can be promoted from level E-1 to E-7 and further to E-7A . For the purpose of promotion from level E-2 to E-3, the criteria is laid down in Clause-8 of the Policy which reads as under:

> "8.1 For promotion from E1 to E2, E2 to E3 & E3 to E4 level.
>
> 8.1.1. Factors which are to be taken into account for determining the suitability for promotion of an executive in the above grades and the weightages thereof will be as under:
>
> | Factors. | Maximum Points. |
> |---|---|
> | Performance Appraisal Ratings(for last 3 yrs.) | 45 |
> | Grade Service. | 25" |

However, in terms of the policy, the eligibility period for promotion for all levels is stipulated in Clause-4.8:

> "Eligibility Period:
>
> In view of the fact that merit, efficiency and suitability can be meaningfully determined on the basis of

> assessment of performance and potential over a reasonable period, there shall be a minimum period of service in a grade, to be called the “Eligibility Period” and only those executives who complete the minimum period so prescribed will be eligible for consideration for promotion to the next higher grade.
>
> The eligibility period shall be three years for promotion of executives at all levels.
>
> In case where company’s selection board during the interview has found a candidate suitable for a post higher than his eligibility for the post and has given promotion commitment in exceptional cases, D(P)/CMD will be competent to relax the eligibility period for promotion and promote the employee as per the commitment for promotion”

For the purpose of promotion to level E-2 to E-3, the proceedings of the Departmental Promotion Committee were held on 26th November, 2001, wherein petitioner’s case for promotion was considered but he was not recommended for the reason that his ACR for the period January, 1999 to July, 1999 was reported as”not satisfactory” and, therefore, he was not found fit to be promoted. It is undisputed that petitioner was found not fit due to his adverse ACR for the said period.

As per the petitioner’s grievance, he learnt about this adverse entry for the first time only after he was not promoted as the same was never communicated to him at any point in time. Petitioner has been victimized by the private respondents No.2 and 3 who have written and reviewed the ACR respectively. It is a malafide action on the part of the respondents. According to the petitioner an F.I.R. against respondent No.2, in relation to his claim of Leave Travel

Concession, was registered which he was required to look into being posted in the Vigilance Department of NJPC. Respondent No.2 wanted him to tough his line to which he refused. Therefore he harboured a grudge against the petitioner and abused his authority, to malafidely prepare a false and concocted appraisal report.

In any case respondent No.3 could not have reviewed the ACR for the said period for the simple reason that he had left the services of NJPC on 31st July, 1999. Vide instructions dated 22nd January, 2001 all adverse entries are required to be communicated to the employees.

Petitioner sought a review of the decision in terms of his representation dated 28th November, 2001. To substantiate the factum of malice, attention has been drawn towards letters dated 31st March,2000 and 27th April,2000 written by the petitioner to show that respondent No.2 had wrongly withheld his salary which was subsequently released with the intervention of the appropriate-authorities.

Since the respondent-authority did not respond to the said representations, the present writ petition was preferred in April, 2002. On 2nd May, 2002, when the matter came up for hearing, this Court observed that any promotions, made shall be subject to the final outcome of the present writ petition.

Learned counsel for the petitioner has submitted that the petitioner's career throughout has been exceptionally good and except for the period of seven months i.e. from January, 1999 to July, 1999, the petitioner's ACRs were either "very good" or "excellent".

The down grading of the petitioner's appraisal report in itself amounts to adverse entry and, therefore, the same ought to have been communicated to the petitioner which was not done in the present case. The said adverse entry is a result of malice on the part of respondent No.2 and non-application of mind on the part of respondent No.3 who in any event was not authorized to review the ACR having left the service. Instructions issued by NJPC in vogue from 22nd January, 2001, required adverse entries to be communicated to the petitioner. In the present case, since the ACR was written and reviewed, after coming into force of the said instructions, the same ought to have been communicated which was not done so in the present case.

The learned counsel has relied upon *Gurdial Singh Fijji Vs.State of Punjab and others* (1979) 2 Supreme Court Cases 368,*Brij Mohan Singh Chopra Vs. State of Punjab* (1987) 2 Supreme Court Cases 188, *Swatantra Singh Vs.State of Haryana and others* (1997) 4 Supreme Court Cases 14, *Badrinath Vs. Government of Tamil Nadu and others* (2000) 8 Supreme Court Cases 395 and *U.P.Jal Nigam and others Vs. Prabhat Chandra Jain and others* (1996) 2 Supreme Court Cases 363, to contend that adverse entries need to be communicated and absence thereof would amount to violation of principles of natural justice. He has further relied upon *Prabodh Sagar vs. Punjab State Electricity Board and others (*2000) 5 Supreme Court Cases 630, to impress upon his plea of malice.

In the counter affidavits filed, respondents No. 2 and 3 have denied the allegation of malice and NJPC has stated that the appraisal report which was to be initiated and submitted by the

petitioner in the year 1999 was not done despite various requests and advices therefore, it was only in May, 2001 the process had to be initiated and finally completed. Learned counsel for the NJPC has relied upon the decision rendered in Nutan Arvind (Smt.) Vs. Union of India and another (1996) 2 SCC 488 and *Badrinath Vs. Government of Tamil Nadu and others* (2000) 8 SCC 395.

With regard to his ACRs for periods including the one in issue, petitioner has made following averments in his petition:

> "b) That the petitioner is an honest and hard working officer. This is evident from the fact that for the year 1998 his AAR rating is "Very efficient". For the year 2000 it is "exceptional". From July 1999 to December 1999 it is "very efficient". However from January 1999 to July 1999 the same is not satisfactory. The assessment for this period has been made by respondent 2 and 3 both of whom were facing corruption charges. As the petitioner was enquiring charges against respondent No.2 the "not satisfactory" assessment made by respondent No.2 and ratified by respondent No.3 that too on a blank AAR Form not filled by petitioner is a result of malafide and colorable exercise of power and has been done by respondents 2 and 3 to harass the petitioner with the ulterior motive of making him suffer for conducting inquiry against respondent No.2 and not toeing his line."

NJPC has responded to the said para as under:

> "The contents of this para are denied. The annual appraisal report written by Reporting Officer as well as the Accepting Officer was not satisfactory for the reasons given above and as such, the said annual appraisal report was binding upon the Departmental Promotion Committee".

Thus, it is clear that except for the period from January, 1999 to July, 1999, the petitioner's performance prior and later was "very efficient" and "exceptional".

My attention has been drawn to the material on record to show that the action of respondents No. 2 and 3 is as a result of colorable exercise of power and an abuse of authority vested in them. I do not intend to go into the same as, in my view, the matter can be decided on a limited point on non communication of the adverse appraisal report to the petitioner.

I am of the view that the petitioner's appraisal report containing adverse entries for the period in question, ought to have been communicated to him. Keeping in view the ratio of the law laid down by the apex Court in *U.P.Jal Nigam's* case (supra), wherein it has been held that even down grading of entry of the performance needs to be communicated to the delinquent officer as the same would adversely affect his career resulting into civil consequences.

From the record it is evident that it is not the case of the NJPC that the petitioner was otherwise found unfit for promotion and, therefore, was not recommended. The Departmental Promotion Committee assessed the petitioner on the basis of the adverse entry and in accordance with the policy. Obviously, the petitioner could not have got the requisite marks for being assessed for promotion.

In the present case, no reason has been assigned whatsoever for down grading the petitioner's appraisal report from "very efficient", & "exceptional" to "not satisfactory". I am not deciding

the competence of respondent No.3 as I am deciding the issue on a limited point.

In *Badri Nath's* case (supra), the apex Court laid down the principles of interference by the courts, in service matters and quashed the action of the respondents on the ground of legal bias. In fact, the scope of the Court to interfere under Article 226 of the Constitution in the case of non consideration or exclusion of a candidate for promotion has been reiterated by the apex Court. After considering the entire case law it has been reiterated that under Article 16 of the constitution, every officer has a right to be considered for promotion to the higher post subject to availability. The manner in which the case of the employees to be considered is a matter of considerable importance in service jurisprudence as it deals with fairness in the matter of consideration for promotion under Article 16 of the Constitution. It inter alia deduced the following principles:

> "(1) Under Article 16 of the Constitution, right to be "considered" for promotion is a fundamental right. It is not the mere "consideration" for promotion that is important but the "consideration" must be "fair" according to established principles governing service jurisprudence.
>
> (2) Courts will not interfere with assessment made by DPCs unless the aggrieved officer establishes that the non-promotion was bad according to Wednesbury principles or was mala fides."

Admittedly, non submission of appraisal report by an contemplate employee is not considered to be a misconduct entailing disciplinary action. No action has been initiated against the employee

in this regard. That the alleged delay for not initiating the ACR within time, would not make any difference. Nothing stopped the respondents to initiate the same. They waited and when the action for filing the appraisal report was initiated the new policy had already came into effect and NJPC was bound to communicate the adverse entry to the employee in terms of its admitted instructions dated 22nd January, 2001.

Apprehending the unfair action on the part of respondent No.2, for the reasons already set out earlier, in terms of letter dated 10th March, 2000, the petitioner had already requested the Chairman of NJPC seeking permission to submit the AAR for the relevant year directly to AGM (Vigilance)/Additional S.E. for assessment. The respondent did not do so. There is no plausible explanation in this regard.

It is a settled law that non communication of adverse entry recorded in the ACR is required to be communicated to the employee failure of which would amount to violation of principles of natural justice.

In my view, in compliance of the principles of natural justice and also its policy, the adverse appraisal report whereby the petitioner's performance was reduced to "not satisfactory" ought to have been communicated to him. Since the same was not done, it cannot be said that the petitioner's case was considered in the light of the principles laid down by the apex Court in *Badrinath* (supra). With the factual matrix in hand, it cannot be said that the petitioner's consideration for promotion is fair and in accordance with the established principles of service jurisprudence.

In *Gurdial Singh Fijji* (supra), the apex court has held as under:

> "17 The principle is well settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity t improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified."

In *Brij Mohan* case (supra) the Court has held as under:

> "Further, whenever an adverse entry is awarded to a government servant it must be communicated to him. The object and purpose underlying the communication is to afford an opportunity to the employee to improve his work and conduct and to make representation to the authority concerned against those entries"

In *Swatantar Singh* case (supra), the apex court has held as under:

> "The object of writing the confidential report of a government servant and communication of the adverse remarks is to afford an opportunity to the officer concerned to make amends to his remissness; to reform himself; to mend his conduct and to be disciplined, to do hard work, to bring home the lapses in his integrity and character so that he corrects himself and improves the efficiency in public service. The entries, therefore, require an objective assessment of the work and conduct of a government servant reflecting as accurately as possible his sagging inefficiency and in competency. The

> defects and deficiencies brought home to the officer, are means to the end of correcting himself and to show improvement towards excellence."

In *U.P.Jal Nigam* case (supra), the relevant portion of the judgment is reproduced as under:

> "The Nigam has rules, whereunder an adverse entry is required to be communicated to the employee concerned, but not downgrading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any adverseness that is not required to be communicated. As we view it the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but if the graded entry is of going a step down, like falling from 'very good' to 'good' that may not ordinarily be an adverse entry since both are a positive grading. All that is required by the authority recording confidential in the situation is to record reasons for such downgrading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one-time achievement. This would be an undesirable situation. All the same the sting of adverseness must, in all events, not be reflected in such variations, as otherwise they shall be communicated as such. It may be emphasized that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case we have seen the service record of the first respondent. No

> reason for the change is mentioned. The downgrading is reflected by comparison. This cannot sustain. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court."

In *Nutan Arvind's case (supra),* the Court held that it was not open for the petitioner to challenge the competence of the officer reviewing the appraisal report

Undoubtedly, petitioner has now been promoted during the pendency of the present writ petition. Non promotion of the petitioner for the reasons given in 2001 itself entails civil consequences. It inter alia, affects the petitioner's right of salary and further timely promotion.

Keeping in view the totality of the circumstances, the action of NJPC in not promoting the petitioner is held to be bad in law. Consequently, it is directed that the respondents shall consider the case of the petitioner for promotion from level E-2 to level E-3 ignoring the ACR for the period of January, 1999 to July, 1999 for the reason that the same was not communicated to him. The writ petition is accordingly allowed.

**(Sanjay Karol),**
**Judge.**

**August 22nd , 2007.(R)**